

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MOHAMAD ALI SAID,

Plaintiff,

vs.

COUNTY OF SAN DIEGO, DEPUTY
SHERIFF PATRICK LOPATOWKY,
DEPUTY SHERIFF BRIAN
BUTCHER, DEPUTY SHERIFF LEE
SCOTT, and DOES 1-50,
INCLUSIVE,

Defendants.

CASE NO. 12cv2437-GPC(RBB)

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

[Dkt. No. 52.]

Before the Court is Defendants County of San Diego, Patrick Lopatosky and Brian Butcher's motion for partial summary judgment filed on February 23, 2015. (Dkt. Nos. 52, 55¹.) Plaintiff Mohamad Said filed an amended opposition on March 23, 2015. (Dkt. No. 55.) A reply was filed on April 1, 2015. (Dkt. No. 63.) After a review of the briefs, supporting documentation, and the applicable law, the Court GRANTS in part and DENIES in part Defendants' motion for partial summary judgment.

Procedural Background

On October 9, 2012, Plaintiff filed a 42 U.S.C. § 1983 civil rights complaint

¹On February 24, 2015, Defendants filed an amended memorandum of points and authorities and amended separate statement of undisputed material facts. (Dkt. No. 55.)

1 against County of San Diego (“County”), Deputy Sheriff Patrick Lopatowsky
 2 (“Lopatowsky”), Deputy Sheriff Brian Butcher (“Butcher”), and Deputy Sheriff Scott
 3 Lee (erroneously named as Lee Scott). (Dkt. No. 1.) On May 15, 2013, the Court
 4 granted Defendants’ motion to dismiss the complaint with leave to amend. (Dkt. No.
 5 16.) On June 12, 2013, Plaintiff filed a first amended complaint. (Dkt. No. 17.) On
 6 October 30, 2013, the Court granted Defendants’ motion to dismiss the first amended
 7 complaint with one final opportunity to amend. (Dkt. No. 22.) On November 19,
 8 2013, Plaintiff filed a second amended complaint (“SAC”). (Dkt. No. 23.) On January
 9 21, 2014, the Court granted in part and denied in part Defendants’ motion to dismiss.
 10 (Dkt. No. 31.) Specifically, the Court granted Defendants’ motion to dismiss the cause
 11 of action for equal protection and all causes of action against Defendant Scott Lee, and
 12 the Court denied Defendants’ motion to dismiss the causes of action for excessive
 13 force, false arrest, denial of medical attention, malicious prosecution, § 1983 cause of
 14 action against the County of San Diego and all state law causes of action.² (*Id.*)

15 Defendants now seek partial summary judgment on the causes of action against
 16 the County of San Diego for violation of 42 U.S.C. § 1983 and against Defendants
 17 Lopatowsky and Butcher for unlawful arrest, inadequate medical care, and malicious
 18 prosecution under § 1983 and state law claims for false arrest and violation of
 19 California Civil Code section 52.1.

20 **Factual Background**

21 On June 16, 2009, a domestic violence misdemeanor complaint for the use of
 22 force and violence and the infliction of injury on his spouse, Walla Said, aka Walaa
 23 Alqershi (“Alqershi”) was filed against Plaintiff in the Superior Court of California,
 24 County of San Diego, East County Division. (Dkt. No. 57, Ds’ NOL, Ex. 1.) The
 25 complaint alleged three counts consisting of: 1) corporal injury to spouse and/or

26
 27 ²The state law causes of action against all Defendants consist of negligence,
 28 battery, false arrest and violation of California Civil Code section 52.1. (Dkt. No. 23, SAC.)

1 roommate in violation of California Penal Code (“Penal Code”) section 17(b)(4); 2
2 battery of a current or former significant other in violation of Penal Code section
3 243(e)(1); and 3) battery in violation of Penal Code section 242. (Id.) A criminal
4 protective order against Plaintiff in favor of Alqershi as the protected person was
5 issued on July 13, 2009. (Id., Ex. 2.) On March 24, 2010, a jury found Plaintiff guilty
6 of the crime of battery of a significant other in violation of Penal Code section
7 243(e)(1), and simple battery in violation of Penal Code section 242. (Id., Ex. 4.) On
8 May 24, 2010, Plaintiff was sentenced to, among other things, three years of summary
9 probation, a condition of which was compliance with a criminal protective order that
10 prohibited Plaintiff from having any personal, electronic, telephonic, or written contact
11 with Alqershi or from coming within 100 yards of her. (Id., Exs. 4, 5.) The protective
12 order was to expire on May 23, 2013. (Id., Ex. 5.)

13 Plaintiff was informed of the meaning of the protective order at his sentencing
14 hearing. (Dkt. No. 52-4, Karnavas Decl., Ex. 7 (CD audio recording of Plaintiff’s
15 sentencing on 5/24/10.)) The sentencing judge explained to Plaintiff that under the
16 protective order, even if Alqershi called him, he must hang up the phone and walk
17 away. (Id.) At his deposition, Plaintiff admitted that he understood his sentence and
18 that he was subject to a full protective order and was to stay away from Alqershi. (Dkt.
19 No. 52-4, Karnavas Decl., Ex 4, Said Depo. at 144:12-17; 146:21-24; 170:8-10;
20 176:22-177:4; 177:24-178:24; 180:10-14; 185:2-7.) He was also aware that only the
21 Court could rescind the protective order and that neither he nor Alqershi could do it on
22 their own. (Id. at 185:2-7.) Plaintiff had an Arabic interpreter at his trial and
23 sentencing. (Id. at 144:12-17.) Subsequently, Alqershi returned to Plaintiff and
24 became pregnant with Plaintiff’s second child, a daughter, to whom she gave birth in
25 October 2011. (Id. at 222:2-24.)

26 On January 24, 2012, at approximately 5:51p.m., the Sheriff’s Department
27 communications center received a 911 call from a woman identifying herself as Walaa
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1 Alqershi. (Dkt. No. 52-7, Harb Decl., Ex. A, 911 CD audio recording.) She stated that
2 she was in the house with Plaintiff and lives with him. (Id.) She was fearful because
3 he threatened to kill her if she called the cops, and then kill himself. (Id.) Alqershi
4 explained that she had a restraining order against her husband, but was living with him
5 and that he was driving her crazy, and she was afraid he was going to kill her. (Id.)
6 She also said she just recently came back from a mental institution and it was her fault
7 that she went back with him. (Id.) Alqershi requested law enforcement assistance and
8 while on the phone, she indicated she was leaving her house located at 3755 El Canto
9 Dr. and was walking to her neighbor's house located at 3725 El Canto Dr. (Id.)

10 On the evening of January 24, 2012, Butcher and Lopatosky received a radio call
11 to respond to 3755 El Canto Dr., Spring Valley, California to contact an individual who
12 may have been "5150", in other words, a person who, as a result of a mental health
13 disorder, is a danger to others, or to himself or herself, or is gravely disabled. (Dkt. No.
14 52-5, Butcher Decl. ¶ 2; Dkt. No. 52-6, Lopatosky Decl. ¶ 2.) At some point, the
15 contact address was changed to 3725 El Canto Dr. which is a house a couple of houses
16 down from the original address. (Dkt. No. 52-5, Butcher Decl. ¶ 2; Dkt. No. 52-6,
17 Lopatosky Decl. ¶ 2.) Psychiatric Emergency Response Team ("PERT") clinician,
18 Cynthia Van Lom ("Van Lom"), was assigned to work with Butcher and was riding
19 with him in his patrol vehicle. (Dkt. No. 52-5, Butcher Decl. ¶ 2.) Butcher and Van
20 Lom arrived first at 3725 El Canto Dr. and made contact with Alqershi. (Id.) They
21 determined that Alqershi was not "5150" but was upset with her husband. (Id.)
22 Butcher was aware that Alqershi and her husband had a history of domestic violence
23 because he had arrested Plaintiff for spousal abuse in violation of Penal Code section
24 273.5(a) back in April 2009. (Id.) Alqershi told Butcher and Van Lom that she and
25 Plaintiff had been living together, and that on that evening, Plaintiff had threatened to
26 kill her and any cops that showed up if she called the cops. (Id. ¶ 3.) Alqershi wanted
27 Plaintiff arrested. (Id.) Lopatosky arrived at the scene shortly after Butcher and Van
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1 Lom. (Id. ¶ 4.) Butcher told him that he had spoken with Alqershi, and that he believed
2 this was a violation of a restraining order call. (Dkt. No. 52-5, Butcher Decl. ¶ 4; Dkt.
3 No. 52-6, Lopatosky Decl. ¶ 2.) Lopatosky took over as the primary deputy on the
4 scene and also spoke directly to Alqershi. (Dkt. No. 52-5, Butcher Decl. ¶ 4; Dkt. No.
5 52-6, Lopatosky Decl. ¶ 2-3.) Alqershi told Lopatosky that she and Plaintiff had been
6 married for about 5 years, that they currently live together, and have two children
7 together, a four year old and a 3 month old. (Dkt. No. 52-6, Lopatosky Decl. ¶ 2-3.)
8 Alqershi indicated that she had been the victim of domestic violence by her husband
9 about a year and a half earlier, and that as a result of that incident, a restraining order
10 was issued against him, that he had been served with the order, and that he was not to
11 be within 100 yards of her. (Dkt. No. 52-6, Lopatosky Decl. ¶ 3.) Alqershi indicated
12 that she had stayed at a shelter called Becky's House after the domestic violence
13 incident but that after her stay at Becky's House, Plaintiff picked her up and they had
14 been living together ever since, even though the restraining order was still in place.
15 (Id.) Alqershi told Lopatosky that on that evening, her husband had threatened to kill
16 her, kill any responding law enforcement, and then kill himself, but that he had not
17 done anything to her physically. (Id.) Alqershi wanted Plaintiff arrested. (Id.)
18 Lopatosky also confirmed that while Alqershi appeared upset by the circumstances
19 with her husband, she did not appear to be suffering from any type of mental health
20 disorder. (Id.)

21 Butcher conducted a records check through the Sheriff's inquiry channel, and the
22 records check revealed there was an active domestic violence criminal protective order
23 issued in case number C291668, listing Plaintiff as the restrained person, and Alqershi
24 as the protected person. (Dkt. No. 52-5, Butcher Decl. ¶ 5.) The protective order was
25 set to expire on May 23, 2013, and the terms of the order prohibited Plaintiff from
26 having any contact with Alqershi. (Id.)

27 Lopatosky and Butcher went to contact Plaintiff at 3755 El Canto Dr. (Dkt. No.
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52-5, Butcher Decl. ¶ 6; Dkt. No. 52-6, Lopatosky Decl. ¶ 5.) Plaintiff was handcuffed and thereafter complained of injury to his arm. (Dkt. No. 52-5, Butcher Decl. ¶ 6; Dkt. No. 52-6, Lopatosky Decl. ¶ 5.) Deputy Butcher immediately summoned the Fire Department for paramedic assistance. (Dkt. No. 52-5, Butcher Decl. ¶ 6; Dkt. No. 52-6, Lopatosky Decl. ¶ 5.) The paramedics arrived approximately five minutes later and Plaintiff was taken to the hospital for evaluation. (Dkt. No. 52-5, Butcher Decl. ¶ 6; Dkt. No. 52-6, Lopatosky Decl. ¶ 5.)

In his declaration, Plaintiff states that his ex-wife Alqershi was alcohol and drug dependent and she became uncontrollable and started running away from home. (Dkt. No. 60-3, Said Decl. ¶ 3.) He alleges she fabricated stories against him in order to show Plaintiff was a villain. (Id. ¶ 5.) Plaintiff also states that he was never served with a copy of the protective order and that he did not respond to the judge's question asking whether he understood the order. (Id. ¶ 6.) In fact, Plaintiff claims he asked for an explanation but the judge stated that someone else will explain; however, Plaintiff was never contacted. (Id.) He also states that Alqershi did not live at the house and she was there for a few minutes because he did not allow her to be near the children because child protective services did not want her near the children. (Id. ¶ 8.) Plaintiff states that he never threatened his ex-wife or the officers. (Id. ¶ 9.)

Discussion

A. Legal Standard on Motion for Summary Judgment

Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact

1 is material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc.,
2 477 U.S. 242, 248 (1986).

3 The moving party bears the initial burden of demonstrating the absence of any
4 genuine issues of material fact. Celotex Corp., 477 U.S. at 323. The moving party can
5 satisfy this burden by demonstrating that the nonmoving party failed to make a
6 showing sufficient to establish an element of his or her claim on which that party will
7 bear the burden of proof at trial. Id. at 322-23. If the moving party fails to bear the
8 initial burden, summary judgment must be denied and the court need not consider the
9 nonmoving party's evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60
10 (1970).

11 Once the moving party has satisfied this burden, the nonmoving party cannot rest
12 on the mere allegations or denials of his pleading, but must "go beyond the pleadings
13 and by her own affidavits, or by the 'depositions, answers to interrogatories, and
14 admissions on file' designate 'specific facts showing that there is a genuine issue for
15 trial.'" Celotex, 477 U.S. at 324. If the non-moving party fails to make a sufficient
16 showing of an element of its case, the moving party is entitled to judgment as a matter
17 of law. Id. at 325. "Where the record taken as a whole could not lead a rational trier
18 of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In
19 making this determination, the court must "view[] the evidence in the light most
20 favorable to the nonmoving party." Fontana v. Haskin, 262 F.3d 871, 876 (9th Cir.
21 2001). The Court does not engage in credibility determinations, weighing of evidence,
22 or drawing of legitimate inferences from the facts; these functions are for the trier of
23 fact. Anderson, 477 U.S. at 255.

24 **B. § 1983 Monell Claim as to County of San Diego**

25 Defendant County of San Diego argues that Plaintiff makes numerous allegations
26 of unlawful policies, customs and habits but has provided no evidentiary facts to
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28

1 support the elements of a Monell³ claim. Plaintiff opposes.

2 Cities, counties and other local government entities are subject to claims under
 3 42 U.S.C. § 1983. Monell v. New York City Dep’t of Social Servs., 436 U.S. 658
 4 (1978). While municipalities, their agencies and their supervisory personnel cannot be
 5 held liable under § 1983 on any theory of respondeat superior or vicarious liability,
 6 they can, however, be held liable for deprivations of constitutional rights resulting from
 7 their formal policies or customs. Monell, 436 U.S. at 691-693. Plaintiffs must
 8 establish that “the local government had a deliberate policy, custom, or practice that
 9 was the moving force behind the constitutional violation [they] suffered.” AE ex rel.
 10 Hernandez v. Count of Tulare, 666 F.3d 631, 636 (9th Cir. 2012) (citing Whitaker v.
 11 Garcetti, 486 F.3d 572, 581 (9th Cir. 2007)).

12 The elements of a Monell claim are (1) plaintiff was deprived of a constitutional
 13 right; (2) the municipality has a policy; (3) the policy amounts to deliberate
 14 indifference to plaintiff’s constitutional right; and (4) the policy is the moving force
 15 behind the constitutional violation. Dougherty v. City of Covina, 654 F.3d 892, 900
 16 (9th Cir. 2011) (quoting Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill, 130 F.3d 432,
 17 438 (9th Cir.1997)).

18 A public entity and supervisory officials may be held liable when
 19 “implementation of . . . official policies or established customs inflicts the
 20 constitutional injury” or when a failure to act amounts to “deliberate indifference to a
 21 constitutional right” or when “an official with final policy-making authority . . .ratifies
 22 a subordinate’s unconstitutional decision or action. Clouthier v. County of Contra
 23 Costa, 591 F.3d 1232, 1249 (9th Cir. 2010).

24 A “policy” is a “deliberate choice to follow a course of action . . . made from
 25 among various alternatives by the official or officials responsible for establishing final
 26 policy with respect to the subject matter in question.” Fogel v. Collins, 531 F.3d 824,
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28 ³Monell v. New York City Dep’t of Social Servs., 436 U.S. 658 (1978).

834 (9th Cir. 2008); Long v. Cnty. of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). A “custom” for purposes of municipal liability is a “widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage with the force of law.” St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988); Los Angeles Police Protective League v. Gates, 907 F.2d 879, 890 (9th Cir. 1990); see also Bouman v. Block, 940 F.2d 1211, 1231–32 (9th Cir. 1991). Random acts or isolated events are not sufficient to establish custom. Gates, 907 F.2d at 890.

In the second amended complaint, Plaintiff alleges that the County has “unlawful policies, customs and habits of improper and inadequate hiring, training, retention, discipline and supervision of its sheriff’s deputies, proximately causing the constitutional deprivations, injuries and damages alleged in the First Cause of Action.” (Dkt. No. 23 SAC ¶ 39.) He also alleges that the Defendant has an unlawful policy, custom or habit of permitting unlawful searches and seizures, false arrests and the unnecessary and excessive use of force by sheriff deputies and failing to take action against deputies who commit acts of excessive force. (Id. ¶ 40.) He further specifically complains that the County has inadequate policies relating to “1) enlisting domestic violence victims to participate in contacting and arresting domestic violence suspects. 2) warrantless detentions and arrests of citizens for mere suspicions and without probable cause. 3) use of excessive force by deputies and 4) writing false police reports as a method of covering up acts of excessive force and other improprieties by sheriff’s deputies.” (Id. ¶ 41.) Plaintiff also alleges that County and its sheriff’s department “have refused to investigate, or have inadequately investigated, numerous complaints of false arrest, excessive force and unlawful searches and seizures made by citizens against its sheriff’s deputies over many years, including complaints that resulted in substantial jury verdicts against the deputies and the County.” (Id. ¶¶ 39, 42.)

Defendant County argues that Plaintiff asserts numerous allegations of “unlawful

1 policies, customs and habits” but has presented no evidentiary support during
2 discovery. In support, the County cites to the Plaintiff’s unresponsive, argumentative
3 answers to interrogatories that asked Plaintiff to state the facts to support his Monell
4 claim against the County. (Dkt. No. 52-4, Karnavas Decl., Ex. 1.) In opposition,
5 Plaintiff fails to oppose the motion for partial summary judgment with specific facts
6 from affidavits, depositions, answers to interrogatories, and/or admissions on file
7 showing that there is a genuine issue for trial. See Celotex, 477 U.S. at 324. First,
8 Plaintiff’s brief does not address any of the allegations presented in his complaint.⁴
9 Second, he merely presents argument and presents a conclusory statement that “much
10 more evidence and facts were discovered consequently that make Defense argument
11 futile.” (Dkt. No. 60-1, P’s Response to Ds’ SUF at 1.) No facts are alleged to support
12 any of the allegations in the second amended complaint against the County for a § 1983
13 cause of action.

14 In his own statement of undisputed facts, Plaintiff cites to the arrest report and
15 deposition of Butcher and Lopatosky⁵ and presents his interpretation of the facts and
16 summarily asserts that Defendants misreported or falsified the incident. (Dkt. No. 60-
17 2, P’s SUF Nos. 1-7.) However, even if Plaintiff’s interpretation of the arrest report
18 is correct, the arrest report, itself, concerning this incident is not sufficient to
19 demonstrate the County had a widespread custom or policy that deprived Plaintiff of
20 his constitutional rights. See Gates, 907 F.2d at 890.

21 Here, Plaintiff has failed to produce any factual support of his claim of a Monell

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23 ⁴In fact, he appears to raise a new allegation that the County of San Diego “failed
24 to train its officers and prosecutors adequately about their duty to produce exculpatory
25 evidence such as the name of an eye witness or the reason for the initial visit which has
26 caused this new attorney a lot of time wasted to get information readily available.”
(Dkt. No. 60 at 6.) Even if this allegation were in the second amended complaint,
Plaintiff has failed to provide any factual support.

27 ⁵The Court notes that while Plaintiff cites to Lopatosky’s deposition, the relevant
28 portions of his deposition are not contained in the Shashaty declaration. (Dkt. No. 60-
4.) While some portions of Lopatosky’s deposition are provided in Defendants’
motion, many citations to support Plaintiff’s arguments are not.

1 claim against the County of San Diego. See Celotex, 477 U.S. at 324-25. Accordingly,
 2 the Court GRANTS Defendant County of San Diego's motion for partial summary
 3 judgment on the § 1983 cause of action.

4 **C. 42 U.S.C. § 1983 Causes of Action as to Defendants Lopatosky and Butcher**

5 Defendants Butcher and Lopatosky seek summary judgment on the causes of
 6 action for unlawful arrest, deliberate indifference to serious medical needs, and
 7 malicious prosecution under 42 U.S.C. § 1983.

8 **1. Unlawful Arrest**

9 "A claim for unlawful arrest is cognizable under § 1983 as a violation of the
 10 Fourth Amendment, provided the arrest was without probable cause or other
 11 justification." Lacey v. Maricopa Cnty., 693 F.3d 896, 918 (9th Cir. 2012). Probable
 12 cause exists when the officer has "a reasonable belief, evaluated in light of the officer's
 13 experience and the practical considerations of everyday life, that a crime has been, is
 14 being, or is about to be committed." Hopkins v. City of Sierra Vista, 931 F.2d 524, 527
 15 (9th Cir. 1991) (citation and internal quotations omitted). "Probable cause exists if the
 16 arresting officers 'had knowledge and reasonably trustworthy information of facts and
 17 circumstances sufficient to lead a prudent person to believe that [the arrestee] had
 18 committed or was committing a crime.' " Maxwell v. Cnty. of San Diego, 697 F.3d
 19 941, 951 (9th Cir. 2012) (quoting United States v. Ricardo D., 912 F.2d 337, 342 (9th
 20 Cir.1990)).

21 "In establishing probable cause, officers may not solely rely on the claim of a
 22 citizen witness that he was a victim of a crime, but must independently investigate the
 23 basis of the witness' knowledge or interview other witnesses." Arpin v. Santa Clara
 24 Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001) (citing Fuller v. M.G.
 25 Jewelry, 950 F.2d 1437, 1444 (9th Cir. 1991)). A sufficient basis of knowledge is
 26 established if the victim provides "facts sufficiently detailed to cause a reasonable
 27 person to believe a crime had been committed and the named suspect was the
 28

1 perpetrator.” Peng v Mei Chin Penghu, 335 F.3d 970, 979 (9th Cir. 2003) (quoting
2 Fuller, 950 F.2d at 1444).

3 The “presence of a factual dispute regarding a victim’s complaint at the scene
4 of an alleged domestic disturbance does not defeat probable cause if: 1) the victim’s
5 statements are sufficiently definite to establish that a crime has been committed; and
6 2) the victim’s complaint is corroborated by either the surrounding circumstances or
7 other witnesses.” Id.

8 In this case, Plaintiff was arrested, among other things, for violating a protective
9 order pursuant to California Penal Code section 166(c)(1),⁶ and 273.6(a).⁷ (Dkt. No.
10 57, Ds’ NOL, Ex. 6.) In support of Defendants’ argument that they had probable cause
11 to arrest Plaintiff, they cite to California Penal Code section 836(c).

12 California Penal Code Section 836(c) provides:

13 When a peace officer is responding to a call alleging a violation of a
14 domestic violence protective or restraining order . . . and the peace
15 officer has probable cause to believe that the person against whom the
16 order is issued has notice of the order and has committed an act in
17 violation of the order, the officer shall . . . make a lawful arrest of the
18 person without a warrant and take that person into custody whether or
19 not the violation occurred in the presence of the arresting officer. The
20 officer shall, as soon as possible after the arrest, confirm with the
21 appropriate authorities or the Domestic Violence Protection Order
22 Registry . . . that a true copy of the protective order has been registered,
23 unless the victim provides the officer with a copy of the protective
24 order.

20 Cal. Penal Code § 836(c)(1). Under state law, a peace officer may make a lawful arrest
21 without a warrant if the officer has probable cause to believe that the offender has

23 ⁶California Penal Code section 166(c)(1) provides, “[n]otwithstanding paragraph
24 (4) of subdivision (a), a willful and knowing violation of a protective order or
25 stay-away court order described as follows shall constitute contempt of court, a
misdemeanor” Cal. Penal Code § 166(c)(1).

26 ⁷California Penal Code section 273.6(a) provides: (a) Any intentional and
27 knowing violation of a protective order . . . is a misdemeanor punishable by a fine of
28 not more than one thousand dollars (\$1,000), or by imprisonment in a county jail for
not more than one year, or by both that fine and imprisonment. Cal. Penal Code §
273.6(a)

1 notice of the protective order and has committed an act in violation of the protective
2 order, even if the violation did not occur in the officer's presence. Id.

3 Alqershi called 911 and reported that she needed help because she was afraid
4 Plaintiff was going to kill her because he threatened to kill her and kill himself if she
5 called the cops. According to the 911 call, she initially called from inside the home
6 where Plaintiff was in another room, located at 3755 El Canto Drive, and then during
7 the call, she walked two houses down to 3725 El Canto Drive to go to a neighbor's
8 house where she told the dispatcher she would be waiting. She informed the dispatcher
9 that she had a restraining order against Plaintiff but that she was living with him.
10 When the Deputy Defendants arrived, Alqershi told them that she and Plaintiff were
11 living together and had two young children. She informed them that she was the victim
12 of a domestic violence by her husband about a year and a half earlier, and as a result,
13 a restraining order was issued against him. She informed them that Plaintiff was aware
14 of the protective order. She told them that Plaintiff had threatened to kill her, kill any
15 officers if she called them and then kill himself. She wanted him arrested. Defendant
16 Butcher then conducted a records check through the Sheriff's inquiry channel, and the
17 records check revealed there was an active domestic violence criminal protective order
18 issued in case number C291668, listing Plaintiff as the restrained person, and Alqershi
19 as the protected person which was set to expire on May 23, 2013. (Dkt. No. 52-5,
20 Butcher Decl. ¶ 5.) The terms of the protective order prohibited Plaintiff from having
21 any contact with Alqershi. (Id.)

22 At the time of the arrest, the Deputy Defendants were told that there was a
23 protective order against Plaintiff in favor of Alqershi, Alqersi informed them that
24 Plaintiff threatened to kill her if she called the police, and that Plaintiff had notice of
25 the protective order. Moreover, Defendant Butcher was aware that Plaintiff had been
26 arrested in 2009 for domestic violence. Based on this information, Defendants
27 conducted a records search to corroborate Alqershi's allegations concerning the
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1 protective order. A records search confirmed Alqershi had an active domestic violence
2 protective order against Plaintiff which was still effective on the date of the incident.
3 The Deputy Defendants had a sufficient basis of knowledge based on the detailed facts
4 provided by Alqershi and had corroborating evidence of the protective order to have
5 a reasonable belief that Plaintiff violated the protective order. Thus, the Court
6 concludes that Deputy Defendants had probable cause to arrest Plaintiff.

7 In his opposition brief, Plaintiff only addresses the legal standard on false arrest
8 without citation to authority. (Dkt. No. 60 at 3-4.) He does not dispute Defendants'
9 statement of undisputed facts with specific evidence in the record and only presents
10 arguments. In his declaration, Plaintiff states that he was at home minding his own
11 business and taking care of his children and did not violate the protective order. It was
12 Alqershi who came to his house and initiated the contact and made the 911 call.
13 According to Plaintiff, the Deputy Defendants did not provide any proof of any
14 misconduct. He also alleges that he did not affirmatively respond to the judge's
15 question whether he understood the protective order and in fact was unable to
16 comprehend what was happening. Therefore, he did not agree to the full protective
17 order sentenced by the state court judge. However, Plaintiff's undisputed facts are not
18 supported.

19 The Court listened to the 911 recordings and the state court sentencing
20 proceeding. At sentencing, although very faint, the interpreter responded, "yes" to the
21 judge's question whether Plaintiff understood the contents of the protective order.
22 (Dkt. No. 52-4, Karnavas Decl., Ex. 7.) At the hearing, contrary to his declaration,
23 Plaintiff did not ask for an explanation of the protective order but asked for
24 clarification regarding the public works he was sentenced to. Therefore, Plaintiff has
25 not created a genuine issue of fact as to whether he consented to and was aware of the
26 protective order.

27 Despite Plaintiff's facts concerning his version of what happened prior to the
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1 Deputy Defendants' arrival, the Court looks at the facts at the time of the arrest. See
2 Peng, 335 F.3d at 978 (whether threat of force was in fact used by offender is not
3 material as to what officer knew at the time of arrest). At the time of the arrest, Alqershi
4 told the Deputy Defendants that Plaintiff threatened to kill her if she called the police,
5 that there was a protective order against Plaintiff even though she was now living with
6 him, and that Plaintiff was aware of the protective order. The Deputy Defendants were
7 also aware that Plaintiff had previously been involved in a prior domestic violence
8 incident as Defendant Butcher had arrested Plaintiff in the prior incident. The facts
9 were corroborated with a records check which revealed that there was an active full
10 protective order protecting Alqershi from Plaintiff. Deputy Defendants had knowledge
11 and reasonably trustworthy information of the facts to lead a prudent person to believe
12 that Plaintiff had committed an offense. See Maxwell, 697 F.3d at 951; see also Peng,
13 335 F.3d at 978 ("an officer who is investigating a domestic dispute must make snap
14 decisions regarding whether there is probable cause to arrest. Where, as here, the victim
15 alleges that force, or a threat of force, existed, it is important for officers to err on the
16 side of safety for the victim in order to prevent further violence and allow the parties to
17 cool down.").

18 Plaintiff has not shown a genuine issue of material fact as to whether there was
19 probable cause to arrest Plaintiff. Accordingly, the Court GRANTS Defendants Butcher
20 and Lopotasky's motion for partial summary judgment on the § 1983 claim for false
21 arrest.

22 **2. Deliberate Indifference to Serious Medical Needs**

23 Defendants Butcher and Lopatosky argue that Plaintiff has failed to demonstrate
24 that they were deliberately indifferent to Plaintiff's serious medical needs. Plaintiff
25 does not oppose Defendants' argument.

26 "The due process clause requires responsible governments and their agents to
27 secure medical care for persons who have been injured while in police custody."
28

1 Maddox v. City of Los Angeles, 792 F.2d 1408, 1415 (9th Cir. 1986) (citing City of
2 Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)). The Due Process Clause of the
3 Fourteenth Amendment guarantees a pretrial detainee the right to receive adequate
4 medical care, and that right is violated if officials are deliberately indifferent to the
5 detainee's serious medical needs. Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232,
6 1242–43 (9th Cir. 2010). Deliberate indifference exists when an official knows of and
7 disregards a serious medical condition, i.e., when an official is “aware of facts from
8 which the inference could be drawn that a substantial risk of serious harm exists” and
9 actually draws that inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

10 Here, the second amended complaint states that Defendants used unreasonable
11 force when they twisted his right arm and caused his elbow to become dislocated. (Dkt.
12 No. 23, SAC ¶ 53.) He alleges that Defendants were deliberately indifferent to
13 Plaintiff's medical needs when Lopatosky knew that the forceful twisting caused the
14 injury, and elected to keep the handcuffs on and then proceeded with the other officers
15 to pull Plaintiff barefoot outside the house to his wife's location. (Id. ¶ 55.) He alleges
16 that Lopatosky and the other officers should have called the paramedics immediately
17 but they chose to ignore and subject Plaintiff to unnecessary pain and possible
18 exacerbation of his injury. (Id.) Moreover, the ambulance did not arrive until two hours
19 later even though the defendants knew he was suffering from excruciating pain. (Id. ¶
20 21.)

21 Defendants present the uncontradicted declarations of Defendants Butcher and
22 Lopatosky who state that as soon as Plaintiff complained his arm had been injured,
23 Butcher immediately summoned the Fire Department for paramedic assistance. (Dkt.
24 No. 52-5, Butcher Decl. ¶ 6; Dkt. No. 52-6, Lopatosky Decl. ¶ 5.) The paramedics
25 arrived about five minutes later and Plaintiff was taken to the hospital via ambulance.
26 (Id.) Plaintiff also testified that the ambulances came within minutes of the call. (Dkt.
27 No. 52-4, Karnavas Decl., Ex. 4, Said Depo. at 88:2-8.) Therefore, Defendants have
28

1 demonstrated that there are no genuine issues of material fact on this cause of action.
 2 Accordingly, the Court GRANTS Defendants motion for partial summary judgment on
 3 the § 1983 claim for deliberate indifference to serious medical needs.

4 **3. Malicious Prosecution**

5 Defendants assert that they are entitled to summary judgment because Plaintiff
 6 has provided no evidence that Defendants took any action to compromise the
 7 prosecutor's independent judgment to overcome the Smiddy⁸ presumption. Plaintiff
 8 opposes.

9 In the Ninth Circuit, a claim for malicious prosecution is not cognizable under 42
 10 U.S.C. § 1983 if process is available within the state judicial system to provide a
 11 remedy. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (citations
 12 omitted). However, if malicious prosecution is “conducted with the intent to deprive
 13 a person of equal protection of the laws or is otherwise intended to subject a person to
 14 a denial of constitutional rights”, a malicious prosecution claim under § 1983 is
 15 available. Id. at 562 (citing Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985)).
 16 To state a claim for malicious prosecution in California under § 1983, a plaintiff must
 17 plead the “(a) the initiation of criminal prosecution, (b) malicious motivation, and (c)
 18 lack of probable cause.” Id.

19 The filing of a criminal complaint by the district attorney gives rise to a
 20 presumption that a decision to file a criminal complaint is presumed to result from an
 21 independent decision on the part of the district attorney and would preclude liability for
 22 those who participated in the investigation or filed a report that resulted in the initiation
 23 of proceedings. Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981) (“Smiddy I”)
 24 overruled on other grounds by Beck v. City of Upland, 527 F.3d 853, 865 (9th Cir.
 25 2008)). However, the presumption can be rebutted if the investigating official
 26 “improperly exerted pressure on the prosecutor, knowingly provided misinformation to
 27

28 ⁸Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981).

1 him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith
 2 conduct that was actively instrumental in causing the initiation of legal proceedings.”
 3 Awabdy v. City of Adelanto, 368 F.3d 1062, 1067 (9th Cir. 2004) (applying Smiddy I
 4 presumption to malicious prosecution case). A “plaintiff’s account of the incident in
 5 question, by itself, does not overcome the presumption of independent judgment.”
 6 Newman v. County of Orange, 457 F.3d 991, 994 (9th Cir. 2006).

7 In the second amended complaint, Plaintiff alleges that Defendants Butcher and
 8 Lopatosky illegally arrested him, falsified the police reports and as a result, criminal
 9 proceedings were initiated. (Dkt. No. 23 SAC ¶¶ 62-64.) Eventually, the criminal
 10 charges were dropped before trial. (Id. ¶ 62.) The SAC also asserts that Defendant
 11 Lopatosky fabricated many lies to cover his and his partners’ use of excessive force that
 12 led to his injury. (Dkt. No. 23, SAC ¶ 61.) By doing do, Lopatosky knew that Plaintiff
 13 would be maliciously prosecuted. (Id.) Three charges were filed against Plaintiff to
 14 deter and scare him from filing this action. (Id. ¶ 62.)

15 On January 22, 2012, Plaintiff was charged with violation of California Penal
 16 Code sections 69 for resisting executive officer; section 273.6(a) for disobeying court
 17 order and section 166(c)(1) for violating the protective order in connection with the
 18 incident that is subject to this lawsuit. (Dkt. No. 57, Ds’ NOL, Ex. 6.) On April 16,
 19 2012, on motion by the People, the case was dismissed. (Dkt. No. 60-4, Shashaty Decl.,
 20 Ex. 8.)

21 In opposition, Plaintiff, in his brief, makes summary conclusions that Defendants’
 22 arrest report prompted the filing of the criminal action, the criminal case ended in
 23 Plaintiff’s favor, there was no probable cause and the action was brought with malice
 24 toward the victim. (Dkt. No. 60 at 4.) Plaintiff only cites to the arrest report to oppose
 25 Defendants’ motion and makes arguments in support. He does not provide any other
 26 admissible evidence to support his opposition. Plaintiff even fails to provide a
 27 declaration as to these issues. Moreover, the citation to Lopatosky’s deposition does
 28 not support Plaintiff’s statements.

1 Plaintiff's allegations that Defendants falsified their arrest reports by solely citing
 2 to the arrest report is not sufficient to rebut the Smiddy presumption. See Newman, 457
 3 F.3d at 994; see also Cervantes v. County of Los Angeles, No. CV 12-9889 DDP
 4 (MRWx), 2014 WL 5528342, at *6 (C.D. Cal. Oct. 31, 2014). Therefore, the Smiddy
 5 presumption applies, and Plaintiff has not demonstrated a genuine issue of material fact
 6 that Defendants are liable for malicious prosecution. Accordingly, the Court GRANTS
 7 Defendants Lopatosky and Butcher's motion for partial summary judgment on the §
 8 1983 claim based on malicious prosecution.

9 **D. State Law Causes of Action as to all Defendants**

10 **1. False Arrest**

11 Defendants Butcher and Lopatowsky argue that their actions are supported by
 12 probable cause under California common law and their actions are statutorily immune
 13 under California Penal Code section 847(b). The County argues it is statutorily immune
 14 under California Government section 815.2. Plaintiff opposes.

15 Under California law, an officer has probable cause for a warrantless arrest "if the
 16 facts known to him would lead a [person] of ordinary care and prudence to believe and
 17 conscientiously entertain an honest and strong suspicion that the person is guilty of a
 18 crime." People v. Adams, 175 Cal. App. 3d 855, 861 (1985) (citation and quotations
 19 omitted); see also People v. Lewis, 109 Cal. App. 3d 599 (1980). The test under federal
 20 law and state law are similar. Peng, 335 F.3d at 976. Penal Code section 847(b) states
 21 that a peace officer shall not be civilly liable for false arrest if the "arrest was lawful or
 22 the officer, at the time of the arrest, had reasonable cause to believe the arrest was
 23 lawful." Cal. Penal Code § 847(b). "Reasonable cause to arrest exists when the facts
 24 known to the arresting officer would lead a reasonable person to have a strong suspicion
 25 of the arrestee's guilt." O'Toole v. Super. Ct., 140 Cal. App. 4th 488, 511 (2006). This
 26 is an objective standard and where the facts are not disputed, reasonable cause for an
 27 arrest can be decided as a question of law. Id.

28 As discussed above on the § 1983 false arrest cause of action, because Deputy

1 Defendants had reasonably sufficient, trustworthy information to establish probable
 2 cause to arrest Plaintiff, the Court concludes that Plaintiff's state law false arrest claim
 3 also fails. Accordingly, the Court GRANTS Defendants Butcher and Lopatosky's
 4 motion for partial summary judgment on the state law false arrest claim.

5 As to the County, it argues it is entitled to summary judgment pursuant to
 6 California Government Code section 815.2. Section 815.2 provides,

7 (a) A public entity is liable for injury proximately caused by an act or
 8 omission of an employee of the public entity within the scope of his
 9 employment if the act or omission would, apart from this section, have
 given rise to a cause of action against that employee or his personal
 representative.

10 (b) Except as otherwise provided by statute, a public entity is not liable
 11 for an injury resulting from an act or omission of an employee of the
 public entity where the employee is immune from liability.

12 Cal. Gov't Code 815.2. Public entities are liable for the actions of their employees.
 13 Rivera v. County of Los Angeles, 745 F.3d 384, 393 (9th Cir. 2014) (citing California
 14 Government Code section 815.2(a)). However, if the employees are immune from
 15 liability, the public entities are also immune. Id. (citing California Government Code
 16 section 815.2(b)).

17 Here, since Deputy Defendants are entitled to summary judgment on the state law
 18 false arrest claim, the County is also entitled to summary judgment. See Cal. Gov't
 19 Code § 815.2(b). Accordingly, the Court GRANTS all Defendants' motion for
 20 summary judgment on the state law false arrest cause of action.

21 **2. California Civil Code Section 52.1**

22 Defendants argue that Plaintiff cannot prevail on a violation of California Civil
 23 Code section 52.1 cause of action because the undisputed facts demonstrate that
 24 Plaintiff can prove no constitutional violation based on unlawful arrest, inadequate
 25 medical care, malicious prosecution and excessive force.

26 The second amended complaint asserts that Plaintiff's rights under the federal and
 27 state constitutions were committed by threats, intimidation and/or coercion by
 28

1 Defendants. (Dkt. No. 23, SAC ¶ 79.)

2 While Plaintiff does not address this issue in his brief, he raises facts in support
3 of his separate statement of undisputed facts on this issue. (Dkt. No. 60-2.) However,
4 these facts are not material to a cause of action under section 52.1 and do not support
5 Plaintiff's allegations. In essence, Plaintiff has not opposed or met his burden in
6 opposing Defendants' motion for partial summary judgment for violation of section
7 52.1.

8 California Civil Code section 52.1 establishes a private right of action for
9 damages and other relief against a person who "interferes by threats, intimidation, or
10 coercion," or attempts to interfere, with the exercise or enjoyment of a individual's
11 constitutional or other legal right. Cal. Civ. Code § 52.1. If there are no federal
12 constitutional violations and no conduct that constitutes a state constitutional violation,
13 there is no conduct upon which to base a claim for liability under California Civil Code
14 section 52.1. Reynolds v. Cnty. of San Diego, 84 F.3d 1162, 1170–71 (9th Cir. 1996),
15 overruled on other grounds by Acri v. Varian Associates, Inc., 114 F.3d 999 (9th Cir.
16 1997) (en banc)). Section 52.1 does not provide any substantive protections; it allows
17 individuals to sue for damages due to constitutional violations. Id. at 1170.

18 Here, the Court concluded that Plaintiff has failed to demonstrate a federal
19 constitutional violation as to false arrest, inadequate medical care, and malicious
20 prosecution. Therefore, to the extent that the section 52.1 claim is based on these three
21 constitutional causes of action, the Court GRANTS Defendants' motion for partial
22 summary judgment. Defendants further argue, without legal authority, that there can
23 be no section 52.1 liability for excessive force, by itself. Since the excessive force
24 cause of action is not before the Court, it is not clear how Plaintiff will raise the section
25 52.1 issue as to excessive force. Accordingly, the Court DENIES Defendants' motion
26 for partial summary judgment as to section 52.1 on the excessive force cause of action.

27 **E. Qualified Immunity**

28 Alternatively, Defendants argue that they are entitled to qualified immunity.

1 Since the Court finds that Plaintiff has not demonstrated a genuine issue of material fact
2 as to all causes of action brought on Defendants' motion for partial summary judgment,
3 the Court need not address whether Defendants are entitled to qualified immunity.

4 **F. Evidentiary Objections**


5 Defendants filed evidentiary objections to evidence submitted by Plaintiff. (Dkt.
6 No. 63.) The Court notes their objections. To the extent that the evidence is proper
7 under the Federal Rules of Evidence, the Court considered the evidence. To the extent
8 that the evidence is not proper, the Court did not consider it.

9 **Conclusion**

10 Based on the above, the Court GRANTS in part and DENIES in part Defendants
11 County of San Diego, Lopatosky and Butcher's motion for partial summary judgment.
12 The Court GRANTS the entirety of Defendants' motion for partial summary judgment
13 with the exception that the Court DENIES all Defendants' motion on the state law cause
14 of action for violation of section 52.1 based on excessive force. The hearing date set
15 for April 10, 2015 shall be vacated.

16 IT IS SO ORDERED.

17
18 DATED: April 9, 2015

19 
20 HON. GONZALO P. CURIEL
21 United States District Judge
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